

July 10, 2013

Clerk of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 95812
Attention: Joelle Howe,
Regulation Coordinator, at jhowe@arb.ca.gov

Re: June 26, 2013, Mandatory Reporting Workshop Comments

Ladies and Gentlemen:

The undersigned companies appreciate the opportunity to comment on matters discussed at the California Air Resources Board (“CARB”) June 26, 2013 Mandatory Reporting Workshop (“Workshop”). These companies trade energy products under the WSPP Agreement, which was discussed at the Workshop, and wish to promote regulatory certainty so that contract terms and risks can be known and stable, and thereby assure parties a functioning market. These comments are submitted solely by the undersigned, and not on behalf of the WSPP or any other WSPP member.

1. Introduction and Background on the WSPP Agreement

WSPP, Inc. is a dues-paying membership organization of companies that trade wholesale energy products with each other under a master trading enabling agreement known as the WSPP Agreement.¹ The WSPP Agreement contains several standardized liquid trading products called “Schedules.”² The WSPP Agreement is a multilateral agreement among many parties, but transactions are generally between two members and bilateral. These bilateral transactions are often links in a longer chain. A can sell to B, who can resell to C, who can resell to D.³ This is called “daisy chaining.” WSPP Agreement bilateral transactions generally do not excuse seller non-performance because a seller further up the daisy chain failed to perform.⁴ Therefore, traders want the contract terms of each transaction in the daisy chain to be as consistent as

¹ Available at http://www.wspp.org/filestorage/current_effective_agreement_050913_updated_060613.doc.

² Schedule C is a “firm” product with limited excuses for failure to perform, and is the most liquid energy product in WECC. Schedule B is a “unit commitment” product that excuses failure to deliver if an identified generating unit fails. Schedule R enables transactions in environmental attributes of renewable resource generation.

³ Such trades can be under the WSPP Agreement, or by parties transacting under a different bilateral agreement, such as the Edison Electric Institute Master Power Purchase & Sale Agreement incorporating by reference product definitions and other terms of the WSPP Agreement.

⁴ There can be excuses in certain cases for certain physical failures of the generation (in the case of Schedule B) and certain transmission infrastructure (e.g., Section 10 of the WSPP Agreement).

possible, so that damages for non-performance by an upstream party can be passed along the daisy chain.

2. Why We Are Submitting These Comments.

We want to maximize the ability of entities to use market mechanisms for compliance with AB32. We believe this is consistent with the goal of AB32. Market mechanisms require regulatory certainty.

The WSPP Contract Subcommittee is developing a form to trade “specified source” (or asset-controlling supplier (“ACS”)) energy. The form would be an attachment to the WSPP Agreement’s Confirmation form, for use with any of the WSPP Schedules, and not be its own separate “Schedule.” We are advised that the Subcommittee hopes to provide a draft to staff in the near future.

We understand that CARB staff wants each link in the daisy chain of specified source contracts to provide it is explicitly purchased and sold as “specified source” energy, and not just explicitly or coincidentally purchased from a specified resource or ACS.⁵ We also heard CARB staff say at the Workshop when discussing slide 10 that “‘specified source’ electricity contracting should include a warranty from the seller that the energy was acquired as specified source power *in accordance with CARB regulations.*”

Market participants want to contract for duties and obligations that could enable the specified source (or ACS) to be claimed as such by the importer under CARB Regulations, but they do not want to contract for “specified source in accordance with CARB regulations.”

The subtle, but crucial, distinction is that parties want defined duties and obligations, and saying “in accordance with CARB regulations” is a vague and indefinable commitment concerning compliance with CARB regulations that could change and mean different things for different entities.

3. The Need for Certainty When “Specified Source” Contracting.

We believe that energy trading parties need to know from CARB the obligations they must provide in their agreements to trade specified source energy. We believe these are obligations to identify a source, provide specific generation records, and agree that a source may be claimed by a downstream purchaser as having been purchased as “specified source” energy, but that these obligations do not include the unknown risks of changing or differently applicable CARB regulations and potentially open-ended verification requirements that are embodied in the words “in accordance with CARB regulations.” Including the latter as part of “specified source” contracting would seriously inhibit market development, function, and availability of specified source energy to California.

⁵ This understanding is based on conversations with staff; we do not find this requirement in the current regulation text.

We also believe that CARB's goals and requirements can be met without any need for parties to contract for the risk of changing or differently applicable CARB regulation and open-ended verification requirements, because defined contract obligations can be written that flow from the simple regulatory requirement of "intentional" specified source purchases and sales. While we do not believe that contract terms should be specifically required by regulations, we provide the following example terms of straightforward contract obligations that would flow from such a straightforward regulatory requirement:

This is a transaction for the purchase and sale of energy from a particular identified generating facility or ACS (the "Source") as a specified source. Seller agrees to provide the energy from the Source. Purchaser may disclose to any potential purchasers from it that both parties agree this transaction is an agreement to deliver energy from a specified source.

Seller agrees to provide to Purchaser, unless Seller is an ACS, Source meter data or its equivalent. Seller authorizes Purchaser to disclose Source meter data or allocated generation data to any purchasers from it.

Seller warrants and represents that it is (i) the ACS, (ii) the owner or operator of the Source or (iii) is selling or remarketing energy procured pursuant to an agreement or transaction that the seller and purchaser agreed is an agreement to deliver energy from a specified source.

Explicit contract obligations that implement a simple and straightforward regulatory requirement are far preferable to words such as "Seller agrees to meet CARB regulations necessary for Purchaser to claim deliveries from the Source as Specified Source energy," or "Seller warrants that it is re-marketing specified source power that was acquired in conformance with CARB regulations." Market participants wish to make promises of known duties as opposed to making promises about CARB, CARB regulations, or how CARB will treat a transaction or entity. Parties would not know what they were agreeing to. Daisy chains would be disrupted as parties allocated these risks differently. "Compliance with CARB regulations" will mean something different to an out of state entity trading at an out of state delivery point that may have determined that it is not subject to CARB jurisdiction than it would to a California utility. A purchaser may not plan to use the purchased product for compliance with CARB regulations, but instead plan to resell it to another party for its compliance use.

These are all reasons why setting forth the specific obligations and duties that would satisfy the CARB regulations is better for both CARB's goals and the marketplace than stating "in accordance with CARB Regulations." Assurance of a simple and known regulatory requirement that can be implemented through express contract-defined obligations and responsibilities will assist in compliance while reducing uncertainty in the marketplace.

4. Electronic Writing Under the WSPP Agreement.

We support the clarification staff provided at the Workshop that the text on Slide 23 of the Electric Power Entities March 26, 2013, webinar slides saying “Written Confirmations for ACS and Specified Source Power- January 1, 2013 forward.” and the language in item 2 of slide 14, saying “following a given trade day, written confirms are developed and sent ... by middle office/trade record staff” do not require parties to put in writing or exchange written confirms respecting transactions that are not required to be sent pursuant to the written enabling agreement, such as is provided in the WSPP Agreement for very short-term transactions and for which Electronic Writings (as defined therein) are sufficient.

We understand that stakeholders provided staff with information demonstrating that verifiers can track and audit transactions entered into orally on tape, by email, or by instant messaging (IM) under a written master agreement that allows electronic writings, such as the WSPP Agreement. The verifier can identify transactions for which it requires information, and the verifier can be promptly provided recordings and archival copies of the electronic writings. We also understand from the staff colloquy at the Workshop that the practice of “trading scripts” that are followed on taped recordings to ensure that specified source transactions are properly documented in electronic writings is acceptable to CARB.

We believe that staff’s current position is consistent with prior CARB rules, FSORs, and guidance, and provide that any requirement for “written confirms” or “written power contract” is satisfied by an “Electronic Writing” under the WSPP.⁶ Since the WSPP Agreement provides that transactions for less than 7 days need not be in a Documentary Writing (i.e., separately written and confirmed, as opposed to an Electronic Writing), a WSPP counterparty cannot require its counterparty to provide a written confirmation for a short term transaction (see Section 32.2.1), and so could not obtain a “written” confirmation of the WSPP transaction beyond the Electronic Writing required in the WSPP Agreement. Further language on slide 14 from the March 26 webinar that “[t]his does not inhibit or restrict transactions on real time desks or short-term trading desks” also means that the requirement for “written power contracts” is

⁶ Item A-12b on pp. 25-26 of CARB’s November 2, 2012, Final Statement of Reasons for Rulemaking on the Amendments rejects SCPA’s proposed deletion of the word “written power contract” and “written document” in subsection (351) because “ARB understands and acknowledges that verbal and electronic records are regularly utilized as part of the electricity procurement process which may include, for example, electronic writing as described in the Western Systems Power Pool (WSPP) Agreement. The power contract definition acknowledges this form of recordkeeping.” The WSPP Agreement has a definition of “Electronic Writing” that includes “[r]ecorded oral conversation; or (2) electronic communications” distinguished from a definition of “Documentary Writing” that means “A document which is physically delivered by courier or U.S. mail, or a copy of which is transmitted by telefacsimile” We understand item A-12b as stating that an Electronic Writing within the meaning of the WSPP Agreement meets CARB’s requirements for a written confirmation as stated in the March 26 webinar, and that a Documentary Writing within the meaning of the WSPP Agreement is not now newly required by the March 26 webinar slides. Page 1412-13 of CARB’s October 2011 Final Statement of Reasons states “[i]t is not our intent to disallow the use of verbal contracts. We believe the accepted industry practices for the ability to make a binding sale based on an oral agreement is typically first spelled out in an overall written agreement, with allowance for sub-agreements, which includes how those sub-agreements can be communicated and executed. These sub-agreements could include acceptable types of communication such as verbal communication, phone messages or emails.” In other words, Electronic Writings within the meaning of the WSPP Agreement meet CARB requirements for a “written power contract”.

satisfied by an “Electronic Writing” under the WSPP. We additionally note that Section 9.6 of the WSPP Agreement requires the parties to maintain and exchange data, which presumably data respecting an upstream transaction, for two years.⁷

Because of the March webinar, we request CARB affirmatively state in regulations that “Written power contracts include electronic writings if provided for in a written enabling agreement between the parties.” Additionally, CARB may also wish to clarify that it is the reporting entity that is responsible for documentation of explicit specified source contracting all the way through to the source.

5. The Importance of Non-Retroactivity.

One of the most important features of any new regulation is that it does not have retroactive application. As CARB saw from industry comments provided to CARB staff following the March 26, 2013, webinar regarding written power contracts, commercial parties are not able to adjust their contracts in arrears. No company can govern its behavior based on regulations that were unknown to anyone at the time of contracting. Allocating regulatory risk is commercially impossible when that regulatory risk might include retroactive changes in requirements.

6. Conclusion.

- Trading parties want certainty for the obligations they are required to enter into to trade “specified source” energy, such as obligations to identify a source, provide specific records, and that a source may be claimed by a downstream purchaser as having been explicitly purchased as “specified source” energy, but they do not want to be required to contract for the open regulatory risks of changing or differently applicable CARB regulations or open-ended verification requirements.
- We ask that CARB affirmatively provide that “Written power contracts include electronic writings if provided for in a written enabling agreement between the parties.”
- There should be no retroactive application of any new regulation.

⁷ “Each Party, or any third party representative of a Party, shall keep complete and accurate records, and shall maintain such data as may be necessary for the purpose of ascertaining the accuracy of all relevant data, estimates, or statements of charges submitted hereunder for a period of two (2) years from the date the bill was delivered under this Agreement and/or Confirmation. Within a two (2) year period from the date on which the bill was initially delivered, any Party to the applicable transaction may request in writing copies of the records of the other Party for that transaction to the extent reasonably necessary to verify the accuracy of any statement or charge. The Party from which documents or data has been requested shall provide all reasonably requested documents and data within a reasonable time period.”

cc: Wade McCartney